85-1652 (3)

No. .....

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

RALPH KEMP, WARDEN,
Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

APPENDIX VOLUME II

SUSAN V. BOLEYN
Assistant Attorney General
Counsel of Record for
Petitioner

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-71-THOM

CARL J. ISAACS AND
GEORGE ELDER DUNGEE,

Petitioners

v.

CHARLES R. BALKCOM, WARDEN,
GEORGIA STATE PRISON,

Respondent

OPINION AND ORDER

(Filed October 22, 1981)

The Petitioners in the above styled case, Carl J. Isaacs and George Elder Dungee, were indicted by the grand jury of Seminole County, Georgia, for the offense of murder, six counts, on September 4, 1973. The Petitioners received separate jury trials, with Petitioner Isaacs being convicted of six counts of murder on January 3, 1974, and Petitioner Dungee being found guilty on all six counts of murder on January 9, 1974. As the jury at the trial of each Petitioner found statutory aggravating circumstances as to each count of murder, these Petitioners received the death penalty on each of the six counts with which they had been charged and convicted. Presently pending before this Court is the application for federal habeas corpus relief under 28 U.S.C. § 2254. Petitioners originally filed their joint habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court, Southern District of Georgia, Savannah Division, on June 6,

1979, but their joint habeas corpus petition was transferred to this Court on November 25, 1980. In a stipulation entered into in the Southern District of Georgia on September 15, 1980, counsel for the parties agreed that Petitioners had complied with the doctrine of exhaustion of state remedies as required by 28 U.S.C. § 2254(b) and (c), and therefore, that issue is not one to be reviewed by this Court. An extensive procedural history was set out in this first stipulation by the parties and therefore, it is unnecessary for this Court to review again the procedural history of the Petitioners' cases in the body of this order.

Petitioners raise the following allegations in their original and amended petition for a writ of habeas corpus: (1) that the indictment returned against them failed to allege any of the statutory aggravating circumstances which must be proved beyond a reasonable doubt before capital punishment can be administered, thereby violating their rights to due process and equal protection under the Sixth Amendment, their right to be informed of the nature and cause of the accusation under the Sixth Amendment, and violating their rights to due process and equal protection under the Fourteenth Amendment because the convicting court exceeded its jurisdiction; (2) that Petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment were violated by reason of massive, prejudicial pretrial and trial publicity so as to deny them a fair trial in the proceedings which resulted in their convictions and so as to deny them an impartial and dispassionate consideration of punishment; (3) that their rights to due process under the Four-

teenth Amendment were violated by the trial court's instruction that, "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted"; (4) that the execution of Petitioners' death sentences is violative of their rights under the Sixth, Eighth and Fourteenth Amendments because of the Georgia statutory provisions governing appellate and sentence review in death penalty cases; (5) four allegations generally attacking the imposition of the death penalty per se, and specifically, under Georgia statutory law.

Petitioners' first allegation concerning the alleged violation of their constitutional rights because of the failure of the indictment to allege any of the statutory aggravating circumstances must fail for the same reason that a similar attack was rejected by the United States Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5 Cir. 1978). Petitioners have failed, as did John Spinkellink, to cite any case, either federal or state, which requires the prosecutor to list in the indictment the aggravating circumstances on which he will rely in seeking the death penalty. *Id.* at 609. In fact, this Court notes that state law places no requirement that an indictment for a capital offense allege aggravating circumstances on which a prosecutor intends to rely in seeking the death penalty. See *House v. Stynchcombe*, 239 Ga. 222, 224 (1977); *Smith v. State*, 236 Ga. 12-20 (1976) and *Eberheart v. State*, 232 Ga. 247-253 (1974). Therefore, the decision reached by the state courts in considering this claim as stated in *Dungee, et al. v. Hopper*, 241 Ga. 236 (1978) was correct and this contention by the Petitioners must fail.

The second allegation raised by the Petitioners in their original petition for a writ of habeas corpus is the Petitioners were denied their constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment because of what they contend was "massive and prejudicial" pretrial and trial publicity, which they allege denied them a fair trial in the proceedings which resulted in their convictions and denied them an impartial and dispassionate consideration of punishment. As noted in the stipulated procedural history, the Petitioners, along with co-indictee Wayne Coleman, filed motions for change of venue in the Superior Court of Seminole County, alleging that pretrial publicity had so prejudiced the minds of prospective jurors that Petitioners could not receive a fair trial by an impartial jury in Seminole County, Georgia. Consolidated hearings on the motions were held on September 27 and October 9, 1973.

Documentary evidence and the testimony of three witnesses were introduced in support of Petitioners' motions for change of venue. The Superior Court of Seminole County denied these motions for change of venue on October 9, 1973. Following Petitioners' trials and convictions the Petitioners and Wayne Colman pursued separate direct appeals to the Supreme Court of Georgia in which they alleged as one of their enumerations of error that the Superior Court of Seminole County erred when it denied a change of venue. On the direct appeal of Wayne Coleman and the Supreme Court of Georgia extensively reviewed the issue of whether a change of venue should have been granted and concluded that the Superior Court of Seminole County did not abuse its discretion or violate due process in denying a change of venue. See *Coleman*

v. State, 237 Ga. 84 (1976). Although in the direct appeal of Petitioner Isaacs the Supreme Court of Georgia did not again go through an extensive review of this issue, the Court noted that the same legal issues which had been reviewed in the Coleman case had also been considered in this case. Similarly, in the direct appeal of Petitioner Dungee, the allegation concerning the motion for change of venue was determined to be without merit for the same reasons as were given in the appeal of Wayne Coleman.

Petitioners also raised the issue of alleged prejudicial pretrial publicity in their state habeas corpus petition in the Superior Court of Tattnall County, but because of Respondent's objection that certain selected newspaper clippings were not authenticated additional evidence was not presented to the state habeas corpus court on this issue. Following the denial of relief by the state habeas corpus court the Supreme Court of Georgia again reviewed the issue of alleged prejudicial pretrial publicity and determined that because the issue had been thoroughly reviewed by the court in the original appeals of the Petitioners that it would not be reconsidered. See *Dungee v. Hopper*, 241 Ga. 236 (1978).

After filing their applications for federal habeas corpus relief under 28 U.S.C. § 2254, Petitioners filed a motion for discovery pursuant to Rule 6 of the rules governing § 2254 cases in the United States District Courts. Petitioners' discovery motions were granted by the United States District Court for the Southern District of Georgia and the completion of this discovery by counsel for the Petitioners was allowed following the transfer of Petitioners' habeas corpus action to this Court. Newspaper

clippings and numerous depositions of representatives of broadcast and print media were introduced for this Court's consideration, as well as the affidavit of a demographer about the population characteristics of Seminole County, Georgia. This evidence was received and considered by this Court, in lieu of an evidentiary hearing on this issue. Although Petitioners urge that this case should be remanded back to the state courts for consideration of Petitioners' claims in light of the expanded factual record, this Court declines to remand this case for the reasons which will be hereinafter set forth.

This Court is required under 28 U.S.C. § 2254(d) to apply the "presumption of correctness" to factual determinations made by the state courts unless one of the seven circumstances set forth in this statute are shown by the applicant, admitted by the Respondent, or otherwise appear. See *Sumner v. Mata*, 446 U.S. 1302, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). However, the United States District Court for the Southern District of Georgia allowed Petitioners to supplement the record pursuant to discovery on the issue of prejudicial pretrial publicity. It appears from the Petitioners' final brief submitted to this Court that Petitioners contend that relief should be granted by this Court because actual prejudice invaded the jury box, for which principle they cite *Irvin v. Dowd*, 366 U.S. 717 (1961), or that relief should be granted because the atmosphere in which the trial was conducted was so inherently prejudicial that a fair trial could not be achieved, for which proposition Petitioners cite, *inter alia*, *Rideau v. Louisiana*, 373 U.S. 723 (1963).

The test set forth for determining whether an accused was denied his right to a fair trial by a panel of impartial

jurors, as set forth in *Irvin v. Dowd, supra,* is whether jurors can lay aside their impressions or opinion and render a verdict based on the evidence presented in court. See *Irvin v. Dowd,* 366 U.S. 717 at 722-723 (1961). The often quoted portion of the decision of the Supreme Court of the United States in *Irvin v. Dowd, supra,* is that portion of the court's opinion stating that it does not require that jurors be totally ignorant of the facts and issues involved and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id.* at 722-723.

This Court has reviewed the extensive voir dire proceedings in both the Petitioners' trials and finds that Petitioners have not demonstrated prejudice under the *Irvin v. Dowd* standard. Petitioners cannot establish that "prejudice found its way in the jury panel" as found in *Pamplin v. Mason,* 364 F.2d 1, 6 (5 Cir. 1966). Therefore, this Court must determine based on the expanded record whether or not Petitioners have established that "presumption of prejudice" utilized by the Supreme Court of the United States in *Rideau v. Louisiana,* 373 U.S. 723 (1963). The test set forth for determining whether prejudice may be presumed under *Rideau v. Louisina, supra,* was recently reiterated in *Mayola v. Alabama,* 623 F.2d 992 (5 Cir. 1980). The Court of Appeals for the Fifth Circuit quoted the following as being the standard set forth by the Supreme Court of the United States in *Rideau v. Louisiana*:

> ". . . Where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from

> that community, '[jury] prejudice is presumed and there is no further duty to establish bias.' "
>
> *Mayola v. Alabama,* at 997.

This Court notes as the Court of Appeals for the Fifth Circuit did in *Mayola v. Alabama,* that the *Rideau* principle of presumptive prejudice is only rarely applicable. See *Mayola v. State of Alabama,* 623 F.2d 992, 997 (1980), citing *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976).

Counsel for the Petitioners have presented this Court with a greatly expanded record which they contend supports a finding of presumptive prejudice. Attached to their final brief they have attached a graph outlining the number of column inches of publicity concerning this case, which was presented to the court, from the date upon which the crimes occurred through the conviction of Petitioner Dungee. However, this Court must go further in its inquiry than looking at the amount of publicity which these crimes generated, as it is not the amount of publicity alone which determines whether prejudice may be presumed, but rather, the nature of such publicity which determines whether the principle of *Rideau v. Louisiana, supra,* may be applied. The Petitioners also claim that the content of the pretrial publicity is sufficient to support a finding of presumptive prejudice.

This Court has carefully reviewed the extensive record presented to this Court on this issue. There was a large amount of media coverage of the crimes and the Petitioners prior to their trials, but this Court concludes that a review of the record as a whole does not support a finding of "pervasive prejudicial publicity" of the type

required under the *Rideau* standard. See *Mayola v. State of Alabama*, 623 F.2d 992, 998-999 (5 Cir. 1980) and *Bronstein v. Wainwright*, 646 F.2d 1048 (5 Cir. 1981). This Court concludes that none of the Petitioners' constitutional rights were violated in connection with this allegation.

Much of the evidence presented by the Petitioners in support of their contention was stipulated to by the Respondent and there is therefore no need to remand this case to the state courts for further findings of fact. Additionally, Petitioners and Respondent have stipulated that there has been exhaustion of this issue in the state courts and notions of comity do not require a remand to the state courts for consideration of an issue which has twice been reviewed by the Supreme Court of Georgia, first on direct appeal from Petitioners' conviction and again in reviewing the findings of the state habeas corpus court. The issue is properly before this Court and this Court can apply the applicable federal legal principles to the facts as developed in the record in the state court which has been supplemented in the district court.[1]

Petitioners contend that the trial court's instruction that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted" violated the due process clause of the Fourteenth Amendment and the

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[1]In any event, remand to the state courts for consideration of this issue in light of additional evidence would result only in further delay in the resolution of this issue, as it is likely that any subsequent habeas corpus petition filed in the state courts, would be dismissed as successive.

principles set forth by the United States Supreme Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). A perusal of the trial transcript reveals no language similar to that in *Sandstrom v. Montana, supra,* which would operate so as to create the impermissible "conclusive presumption" found to be constitutionally deficient in *Sandstrom v. Montana, supra.*

Petitioners' final allegations raised in their amended petition for a writ of habeas corpus can be summarized as general attacks on the imposition of the death penalty in general, and under the Georgia statute, specifically. Of course, in *Gregg v. Georgia,* 428 U.S. 153 (1976), the Supreme Court of the United States held that the imposition of the death penalty in Georgia, by means of the present bifurcated procedure, was not violative of the Eighth and Fourteenth Amendments. Additionally, the Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright,* 578 F.2d 582 (5 Cir. 1978), held that "capital punishment is not unconstitional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion." *Id.* at 605.

Petitioners allege that the Georgia statutory procedure governing appellate and sentence review of death penalty cases violates certain of their constitutional rights. This Court notes that the Supreme Court of Georgia did conduct a sentence review in the Petitioners' cases on their direct appeals pursuant to Ga. Code Ann. § 27-2537(c)(1-3). See *Isaacs v. State,* 237 Ga. 105 (1976) and *Dungee v. State,* 237 Ga. 218, 220 (1976). As the statute under

which this sentence review was conducted has been upheld as constitutional by the Supreme Court of the United States and Petitioners have shown no violation of the appellate court statutory duty so as to amount to a violation of their constitutional rights, this allegation is without merit.

Next, Petitioners allege that the death penalty in the State of Georgia is applied "arbitrarily, capriciously, wantonly and freakishly" and also, that the statute is imposed pursuant to a pattern or practice of invidious discrimination on grounds of race, sex, and social or economic status. This allegation is also without merit on the basis of *Spinkellink v. Wainwright*, 578 F.2d 582 (5 Cir. 1978). This Court is unconvinced that the study made by Professors Bowers and Pierce or the transcription of the proceedings in *House v. Balkcom* and *McCorquodale v. Stynchcombe*, require any different finding by this Court than was concluded by the Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright, supra.* Additionally, Petitioners have not shown any specific act of discrimination against them or that the facts and circumstances of their cases are so clearly undeserving of capital punishment, that to impose it would be patently unjust and would shock the conscience. See footnotes 28 and 40 of *Spinkellink v. Wainwright, supra.* These allegations by the Petitioners are without merit. Finally, Petitioners allege that the method of execution, *i.e.*, electrocution, is violative of their constitutional rights to be free from cruel and unusual punishment. This claim must also be rejected. See *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (1978).

CONCLUSION

WHEREFORE, for all of the above reasons, it is ordered that Petitioners' application for federal habeas corpus relief under 28 U.S.C. § 2254 is hereby denied.

This 22nd day of October, 1981.

/s/ J. Robert Elliott
United States District Judge

Mr. Girard W. Hawkins, Clerk
U.S. District Court
P.O. Box 128
Macon, GA 31202

No. 82-8017 CARL J. ISAACS AND GEORGE ELDER DUNGEE V. WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center

(U.S.D.C. No. CA80-71)

Dear Mr. Hawkins:

Enclosed is a certified copy of an opinion-order this day entered by the Court in the above-referenced cause which is self-explanatory.

Returned herewith are the 2 volume record on appeal, the 1 volume first supplemental record on appeal, the 1 volume second supplemental record on appeal, the 1 volume third supplemental record on appeal and the 1 box of exhibits.* When they have served your purpose, please return them to this office, together with any supplemental record that may be prepared.

This case will be held in abeyance for a period of 60 days from this date pending disposition of the remand proceedings.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,
NORMAN E. ZOLLER,
Clerk

By /s/ Abagail H. Burr
Deputy Clerk

/ahb
enclosures

cc and enclosures to:
Honorable J. Robert Elliott
Messrs. James C. Bonner, Jr. and Thomas J. Killeen
Ms. Susan V. Boleyn√

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* The entire record in this case will be forwarded immediately to your office when it is received in our office.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8017

CARL J. ISAACS and GEORGE ELDER DUNGEE,

Petitioners,

v.

WALTER D. ZANT, Warden, Georgia
Diagnostic and Classification Center,

Respondent.

Appeal from the United States District Court
For the Middle District of Georgia

(June 21, 1983)

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge:

PER CURIAM:

Petitioners, Carl J. Isaacs and George Elder Dungee, appeal from the federal district court's denial of their habeas corpus petitions.[1] Isaacs, Dungee, and Wayne Carl Coleman were tried separately, convicted, and sentenced to death for their joint participation in six murders. Before the trials began, all three petitioners filed motions for a change of venue. The state trial court held hearings on their motions, consolidated into one proceeding. After the hearings, the trial court denied these motions.

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* Hon. Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

[1] The district court had granted the motion for consolidation of the habeas corpus proceedings of Isaacs and Dungee. Record, vol. I, at 53.

The companion case of *Coleman v. Zant*, No. 82-8310 (11th Cir. June 10, 1983), has been remanded for an evidentiary hearing on the question whether pretrial publicity and the community's atmosphere were so prejudicial and inflammatory that the trial court's refusal to grant petitioner's motion for a change of venue deprived him of his constitutional rights. With respect to the change of venue issue, the facts in *Coleman v. Zant* are nearly identical to the facts in this appeal. Isaacs, Dungee, and Coleman were indicted for the same crimes, and tried *seriatim* in the same community in January 1974.

On June 10, 1983, we ordered respondent to show cause why this court should not take judicial notice of the proceedings before this court in *Coleman v. Zant, supra,* and remand this case also for an evidentiary hearing on the change of venue issue. Having carefully considered respondent's response[2] to the show cause order, we order a limited remand.

Since the facts relevant to the change of venue issue are nearly identical to those in *Coleman v. Zant,* since the close relationship between these two cases has been recognized and the record in each case has been supplemented on several occasions with portions of the other record, and since this limited remand will cause only a brief delay, we

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[2] Respondent argues that petitioners have not made the showing required by *Townsend v. Sain,* 372 U.S. 293 (1963), that "material facts were not adequately developed at the state court hearing." 372 U.S. at 313. However, that bridge was crossed in the district court where it was either demonstrated or agreed that further evidentiary development in federal court was necessary. The only comity consideration implicated by our decision to order a limited remand is the brief delay involved, which is amply justified in the interests of justice.

conclude that the interests of justice and judicial economy and the expeditious handling of this case require a remand for further development of this issue at an evidentiary hearing.[3] We retain jurisdiction and remand for this limited purpose. The district court shall certify its findings and the record of its proceedings on remand to us on or before August 9, 1983.

REMANDED WITH INSTRUCTIONS.

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[3] Although the management of hearings below are within the discretion of the district court, we contemplate that the district court will want to consolidate the evidentiary hearing herein ordered with that portion of the *Coleman v. Zant* hearings dealing with the same issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-71-THOM

GEORGE ELDER DUNGEE,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

MEMORANDUM AND ORDER ON PETITIONER'S MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF HABEAS CORPUS

(Filed February 11, 1985)

The Petitioner in the habeas corpus matter above identified has filed a motion for leave to amend his petition for a writ of habeas corpus previously filed in this Court. The Respondent opposes the motion. The Court determines that the motion should be denied for the reasons hereinafter stated.

Petitioner was convicted on six counts of murder in the Superior Court of Seminole County, Georgia in September, 1973. He first sought post-conviction relief by means of a petition for writ of habeas corpus filed in the Superior Court of Tattnall County, Georgia in February, 1977. This petition was denied on August 31, 1977, and the Supreme Court of Georgia affirmed the denial of state habeas corpus relief in *Dungee v. Hopper*, 241 Ga. 236 (1978). A petition for a writ of certiorari to the Supreme Court of the United States was denied on October 2, 1978. *Isaacs, et al v. v. Hopper*, 439 U.S. 882 (1978).

The Petitioner next filed an application for federal habeas corpus relief in the United States District Court for the Southern District of Georgia in May, 1979. That petition was consolidated with an application filed on behalf of Carl J. Isaacs by order dated July 9, 1979. The Petitioner and his Co-Petitioner Isaacs filed amended petitions for writs of habeas corpus on July 12, 1979, and a supplemental answer-response was filed by the Respondent on August 2, 1979.

The United States District Court for the Southern District of Georgia granted a motion for discovery filed on behalf of Petitioner Dungee and his Co-Petitioner on October 26, 1979. On November 25, 1980 the United States District Court for the Southern District ordered Petitioner's federal habeas corpus action be transferred to this Court because the Judge for the Southern District of Georgia was of the opinion that he should be disqualified from hearing the case.

After considering all of the evidence which had been developed before the Southern District of Georgia and allowing the submission of certain other items of evidence for this Court's consideration this Court entered an order on October 22, 1981 denying Petitioner Dungee's application for federal habeas corpus relief. On appeal to the United States Court of Appeals for the Eleventh Circuit that court remanded the case to this court for an evidentiary hearing. *Isaacs and Dungee v. Zant*, 709 F.2d 634 (11 Cir. 1983).

An extended evidentiary hearing was conducted in this case during the week of November 5, 1984, and presently post-hearing briefs for the resolution of all issues

before the Court are due for submission to this Court later this month (February, 1985).

While Petitioner's application for federal habeas corpus relief was pending on remand to this Court Petitioner filed a successive state habeas corpus petition in June, 1984. At that time this case had been pending in this Court on remand for approximately a year. An evidentiary hearing was conducted in the Superior Court of Butts County, Georgia, but Respondent's motion to dismiss the petition for a writ of habeas corpus pursuant to O.C.G.A. § 9-14-53 was granted by the Superior Court of Butts County, Georgia, that court finding that all of the grounds relied upon could reasonably have been raised in the original state habeas corpus petition filed on behalf of Petitioner in the Superior Court of Tattnall County, Georgia. The Petitioner filed an application for a certificate for probable cause to appeal to the Supreme Court of Georgia from the dismissal of the successive state habeas corpus petition, which application was denied on November 7, 1984.

It is clear that all of the allegations raised by the petition could have been raised in the first habeas corpus petition filed in the Superior Court of Tattnall County, Georgia, and certainly could have been raised in Petitioner's first application for federal habeas corpus relief or in the first amendment to the application for federal habeas corpus relief filed in July, 1979. The Court also determines that the reasons urged by Petitioner as a basis for the allowance of this amendment do not constitute a sufficient excuse for the extreme untimeliness of this proposed amendment to a petition which has already been amended upon a previous occasion and where the State has found that Petitioner has waived his rights under state law to present these issues on their merits.

In summary, the Court determines that for the Court to allow such an untimely amendment after the submission of all evidence would be to sanction an abuse of the writ of habeas corpus by means of an untimely amendment which essentially constitutes a successive application for federal habeas corpus relief. It is, therefore, the order of the Court that the motion for leave to amend be and the same is hereby disallowed.

This 11th day of February, 1985.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-71-THOM

CARL J. ISAACS and
GEORGE ELDER DUNGEE,

Petitioners,

v.

WALTER D. ZANT, WARDEN,
Georgia Diagnostic and Classification Center,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO REMAND

(Filed March 18, 1985)

On May 15, 1973 four men entered the Alday residence in a rural county in southwest Georgia for the purpose of burglary. Two members of the Alday family came home and were shot to death with hand guns. One of them was shot seven times in the head, the other four times in the head. Later a brother arrived. He was killed with a hand gun. Then the wife of one of the earlier victims arrived. She was shot. Two other family members then came home and both of them were killed. The wife was then raped by two (or more) of the men, bound and blindfolded, driven to a wooden area and raped again, beaten and mutilated. She was then killed with two shots. Her watch was removed from her nude body.

The Petitioners above named were two of the four men. They were brought to trial in January, 1974, and were convicted on six counts of murder. Although more

than eleven years have passed since their convictions they have not yet been punished.

In *Furman v. Georgia,* 408 U.S. 238 (1972), Justice Potter Stewart said:

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law." p. 308.

Columnists and commentators who with increasing frequency are discussing the reasons for the growing public criticism of the courts might feel that they would be justified in using the history of this case as "Exhibit A". Although the evidence of the guilt of the Petitioners was overwhelming, lawyers who did not represent them at trial, while knowing that a "perfect trial" is hardly ever possible, have nevertheless equated a "fair trial" with a perfect trial and have for more than eleven years filed numerous appeals and petitions seeking the reversal of the convictions or a modification of the sentences imposed and these efforts have had the attention of the state courts and the federal courts at all levels. This is the second time this Court has been called upon to review this matter. On the first occasion this Court denied the relief sought. This Court's order was the subject of an appeal to the United States Court of Appeals for the Eleventh Circuit, one of the grounds for appeal being the contention that the Defendants had not been given ample opportunity

to develop evidence which would demonstrate that they had not had a fair trial because of prejudicial pretrial publicity, in other words, that they were simply the victims of a "bad press". The Court of Appeals remanded the case to this Court with direction that the Defendants be given an opportunity to develop the evidence on this issue.

In compliance with the remand order referred to, this Court has allowed extensive discovery in this case on the issue of alleged pretrial publicity, including the submission of evidence in the form of depositions, documentary evidence, affidavits and live testimony, culminating in a final evidentiary hearing consuming some four days.

Considering the passage of so much time since the events which are the subject of this inquiry, it is not surprising that counsel for the parties and the Court have experienced some difficulty in obtaining a well-rounded description of the nature of the newspaper, television and radio coverage. Counsel for Petitioners have obtained some newspaper articles not previously submitted in this case, have substituted copies of articles already received into evidence and have sought out various media sources which might provide information on the coverage given in Seminole County, which is the scene of the events referred to.

The Court does not deem it necessary to list the identities of all of the witnesses who appeared nor identify with particularity all of the documentary evidence which was produced, but the Court does state that testimony presented and the documentary evidence which was produced have been reviewed in their entirety and serve as the basis for the findings of fact herein made.

In considering the evidence offered on the issue of alleged prejudicial pretrial publicity this Court has been guided by the comments made by the Court of Appeals in the remand order on the appropriate standards to be followed in reviewing such a claim, including the standards set forth in *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Murphy v. Florida*, 421 U.S. 794, 799 (1975); and *Mayola v. Alabama*, 623 F.2d 992 (5 Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). Additionally, this Court examined this allegation of alleged prejudicial pretrial publicity in light of the decision of the Court of Appeals for the Fifth Circuit in *Calley v. Callaway*, 519 F.2d 184 (1975), and in light of the recent decision of the Supreme Court of the United States in *Patton v. Yount*, — U.S. —, 104 S.Ct. 2885 (1984). In light of these cases and the instruction of the Court of Appeals in its remand order, Petitioners have now had a full and fair opportunity to develop the facts material to this constitutional claim.

As has heretofore been noted in earlier orders of this Court in this case, a hearing was held in the Superior Court of Seminole County, Georgia, concerning Petitioners' motion for change of venue on September 27 and October 9, 1973. The hearing on the motion was consolidated with the motion of coindictee Wayne Coleman. The Superior Court denied the motion for change of venue on October 9, 1973. Following Petitioners' trials and convictions Petitioners Isaacs and Dungee and coindictee Coleman pursued separate appeals to the Supreme Court of Georgia in which they alleged as one of their enumerations of error that the Superior Court erred when it denied their

motions for change of venue. In Petitioners' appeals to the Supreme Court of Georgia that Court extensively reviewed the issue of whether or not a change of venue should have been granted and concluded that the Superior Court of Seminole County did not abuse its discretion or violate due process in denying a change of venue. *See Isaacs v. State,* 237 Ga. 105 (1976), and *Dungee v. State,* 237 Ga. 218 (1976).

In addition to developing the issue of alleged prejudicial pretrial publicity by means of a motion for change of venue filed prior to trial, Petitioners also raised this issue in state habeas corpus petitions filed in the Superior Court of Tattnall County. Petitioners Isaacs and Dungee had a consolidated state habeas corpus hearing on April 12, 1977 and relief was denied by the Superior Court of Tattnall County on August 31, 1977. A consolidated application for certificate of probable cause was granted by the Georgia Supreme Court. The Supreme Court affirmed the denial of habeas corpus relief to both Petitioners in *Dungee, et al. v. Hopper,* 241 Ga. 236 (1978).

The evidence before the trial court on the motions for change of venue as well as the decision of the Supreme Court of Georgia assumes even more importance in this Court's determination in light of the holding in *Patton v. Yount, supra,* that the presumption of correctness is applicable to a determination that a juror can be impartial. In deciding the Isaacs and Dungee appeals the Supreme Court of Georgia adopted its order in the companion case of *Coleman v. State,* 237 Ga. 84 (1976), in which the Court reviewed the voir dire transcript and found that, " . . . we cannot conclude that the trial court abused its discretion in overruling the motion for a change of venue. During the

voir dire examination there was no showing that the jurors summoned to try the appellant's case had formed such a fixed opinion as to either the guilt or the innocence of the appellant based on news media accounts of the homicides". *Coleman v. State, supra,* at p. 90. *See also Coleman v. State, supra,* at p. 88-89.

Reviewing the voir dire examination in light of the expanded record now before this Court, this Court again concludes that although it is clear that there was widespread knowledge of the fact that there had been a murder of six members of the Alday family in the Seminole County community, Petitioners have failed to show that they were denied their right to a fair trial by a panel of impartial jurors in light of the tests set forth in *Irvin v. Dowd, supra,* i.e., whether jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. *Irvin v. Dowd, supra,* at 722-723. The often quoted portion of the decision of the Supreme Court in *Irvin v. Dowd, supra,* states that it is not required under this standard that jurors be totally ignorant of the facts and issues involved and also notes that scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id.* at 722-723.

In the circumstances here presented the decision of the Court of Appeals for the Fifth Circuit in *Calley v. Callaway,* 519 F.2d 184 (1975), is quite instructive. Lt. Calley was convicted of participation in the so-called "My Lai massacre" and he later sought habeas corpus relief based on the same contention now made by the Petitioners in this case, i.e., that massive and intense pretrial publicity had made it impossible for him to obtain a fair trial.

After full evdentiary hearing the District Court concluded that Calley had been persecuted and pilloried by the news media so intent in making prejudicial revelations about the My Lai incident that Calley's right to a fair and unbiased hearing was impossible at the time the trial was conducted. The Court's review led it to conclude that the publicity was clearly improper, largely biased and undoubtedly prejudicial. It was the Court's finding that it was not humanly possible for the jurors not to be improperly influenced by prior exposure and that no person, however honest minded he might try to be, could avoid the lasting emotional impact of some of the publicity, and that with all the publicity given the incident and Calley's alleged involvement, it would be sheer fantasy to believe that the jurors did not see, hear and read the publicity or that they were not influenced by it. These findings led the District Court to hold the publicity inherently prejudicial to Calley's Sixth Amendment rights. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974).

Citing *Irvin v. Dowd*, the Court of Appeals for the Fifth Circuit reversed the District Court, and in doing so stated:

> "The district court emphasized that the case involved 'massive' and 'intense' publicity. Yet this court has noted previously that '[W]e cannot accept the position that "prominence brings prejudice." *Hale v. United States, supra*, 435 F.2d at 747. Moreover, no court has held that the only impartial juror is an uninformed one. We cannot expect jurors to live in isolation from the events and news of concern to the community in which they live.
>
> It is not required, however, that the jurors be totally ignorant of the facts and issues in-

> volved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
>
> *Irvin v. Dowd, supra,* 366 U.S. at 722-723, 81 S.Ct. at 1642-1643."

The contentions made by Isaacs and Dungee in this case exactly parallel the contentions made by Calley in his case and the pretrial publicity in the Calley case was far more massive and opinionated than the pretrial publicity in this case. So, we are led ineluctably to conclude that the Petitioners in this case cannot prevail on their contention that they were denied a fair trial because of prejudicial pretrial publicity.

Therefore, this Court certifies as a conclusion of law that it reaffirms that portion of its opinion in this case dated October 22, 1981 in which this Court found that Petitioners had failed to establish "actual prejudice", as that standard has been interpreted and applied. This Court stresses that not only was the voir dire proceeding reviewed once again in making this determination, but that the expanded record before the Court on remand was considered in determining whether the standards of *Irvin v.*

Dowd, supra, had been violated. This allegation deserves no further treatment here, as the decision of the Supreme Court of Georgia and earlier opinions of this Court discuss the voir dire proceedings. Further reference to the record before this Court is not necessary in order to squarely certify this Finding of Fact and Conclusion of Law to the Court of Appeals for the Eleventh Circuit.

In making the determination of no "actual prejudice", the Court not only considered the applicable federal principles involved, but also considered the requirement of Georgia law, as contained in former Ga. Code Ann. § 27-1201; O.C.G.A. § 17-7-150, which requires that there should be a change of venue in a criminal case where either one of two situations exist, i.e., where an impartial jury cannot be obtained, or where there is a probability of danger or violence. This Court determines that Petitioners have failed to show that an impartial jury could not be obtained under the "actual prejudice" standard, and now turns to whether or not Petitioners should prevail under an application of the "presumed prejudice standard", or under that provision of Georgia law which requires a change of venue based on a probability of danger or violence.

It is appropriate to recall at this point that evidence introduced before the trial court on the original motion for change of venue filed on behalf of Petitioners and their coindictee is now also before this Court, and this evidence includes fourteen issues of the *Donalsonville News*, the local newspaper; 28 articles from the *Albany Herald*, 24 issues of the *Dothan Eagle;* and 3 magazine articles, all carrying stories from the discovery of the crime on May 15, 1973, through the pretrial hearing on the motions for change of venue.

Turning to an analysis of the evidence before this Court under a "presumed prejudice" standard, we note that Petitioners' assertion that they were denied their constitutional rights due to alleged prejudicial pretrial publicity appears to center around the allegation that due to the nature of the crimes, the nature of the community, the nature of the victims, the volume of pretrial publicity from various media sources, and the content of this pretrial publicity, prejudice to the Petitioners should be presumed, even absent a showing of actual prejudice by reference to the panel of jurors selected to try the Petitioners.

The "presumptive prejudice" standard was promulgated by the Supreme Court in *Rideau v. Louisiana,* 373 U.S. 723 (1963), and the test was recently reiterated in *Mayola v. Alabama,* 623 F.2d 992 (5 Cir. 1980).

Expert witnesses presented at the final evidentiary hearing provided relevant evidence concerning the characteristics of the community and a summarization of the sources and types of media coverage given to the murders, and the available evidence at this time concerning publicity about the murders during the relevant time period. Citizens of Seminole County and reporters who were familiar with this part of the state also provided the Court with information about the nature of the community, all of which was considered by the Court in determining whether or not prejudice should be presumed.

However, the Court declines in this order, as it did during the final evidentiary hearing in this matter, to consider the offer of proof made with regard to Petitioners' expert witnesses as to the conclusions that they would draw about the nature of the publicity concerning the Al-

day murders, i.e., whether the publicity was "inflammatory", "prejudicial", or whether the publicity evidenced a "huge . . . wave of public passion". *See Patton v. Yount, supra.* The Court deems these matters to be factual conclusions that must be made by this Court, in light of the applicable case law, in determining whether Petitioners have been denied their right to a fundamentally fair trial.

From the evidence presented, in its many forms as above described, the Court makes the following Findings of Fact with specific reference to the allegation of presumed prejudice:

There was widespead knowledge among the citizens of Seminole County of the fact that six members of the Alday family, a well-known family in the Seminole County community, had been murdered. It appears from the evidence received from citizens, reporters and expert witnesses, that much of the knowledge about the crimes in this small, rural community may have resulted from word-of-mouth communication. Additionally, the evidence reveals the following *primary* media sources in Seminole County at the time the crimes were committed: (1) the *Donalsonville News,* a weekly newspaper published in the county seat of Seminole County every Thursday; (2) the *Albany Herald,* published in nearby Albany, Georgia (approximately 40 miles from Donalsonville, Georgia); (3) the *Bainbridge Post-Searchlight,* a newspaper published in nearby Bainbridge, Georgia; (4) the *Dothan Eagle,* a newspaper published in nearby Dothan, Alabama; (5) the *Atlanta Journal/Constitution* (to a limited extent, as reflected in evidence before the Court); (6) WSEM, the local radio station in Donalsonville, Georgia; (7) tele-

vision stations in Albany, Georgia; Tallahassee, Florida; and Dothan, Alabama; (8) radio stations in Albany, Georgia, and Bainbridge, Georgia, which could be received to some extent in Seminole County, Georgia; (9) the Georgia Network News, a service apparently utilized during the relevant time period by only one radio station received in Seminole County, Georgia; and (10) reports from Associated Press and United Press International, which may have been utilized by some of the above named radio stations and television stations, as well as by some of the newspapers printing stories concerning the murders.

As revealed by testimony and an examination of the publicity from the various news sources cited above, the initial reaction of Seminole County citizens appeared to be one of "shock" that these murders had occurred in their community. There was also fear among citizens of the County that members of the community might be in danger of having similar acts committed against them, as initially no suspect or suspects in the murders were identified and it was believed that whoever committed the murders might still be in the community. It appears that much of the publicity concerning the murders centered around the initial discovery of the bodies of five of the victims, the search for the body of the sixth victim, Mary Alday, and the attempt to identify a suspect or suspects in the murders with reference to the evidence found at the scene of the crime. Once the four suspects were identified, much of the publicity centered around the search for and apprehension of the suspects in West Virginia and the return of these suspects to Georgia and their subsequent arraignment on these charges.

It is obvious that the amount of publicity substantially subsided in the interval between the arraignment of the Petitioners and their coindictees and the trial of the first of the four accused men, Carl J. Isaacs. During this interval the considerably diminished newspaper coverage concerning the crimes dealt with the progress of the legal proceedings, including the appointment of counsel for the suspects, the withdrawal of certain attorneys for certain of the defendants and the subsequent appointment of new counsel and the filing of various motions on behalf of the four defendants. The Court specifically notes in this regard that several of the reporters who covered the crimes testified that they left Seminole County after the suspects had been arraigned and did not return until the beginning of the trial of Carl Isaacs.

It clearly appears that this marked decrease in publicity resulted in an attenuated "cooling off period" during which the tension felt in the community immediately following the crimes and especially prior to the capture of the suspects decreased. This decrease in tension was similar to the decrease in community tension which was found to have existed between the first trial and second trial of the defendant in *Patton v. Yount, supra.* In this case approximately eight months elapsed between the date the crime was committed and the dates on which Petitioners were brought to trial, and in cases dealing with claims of prejudicial pretrial publicity such a time lapse has been regarded as being a matter of significance. In *Wansley v. Slayton*, 487 F.2d 90, 93-94 (4 Cir. 1973), *cert. denied* 416 U.S. 994 (1974), the court stated that "recency is a critical factor to be considered in connection with any

claim of pretrial prejudicial publicity". In the case of *Calley, supra,* the Court of Appeals took particular note of the fact that several months had elapsed between the time when the pretrial publicity occurred and the time when Calley was brought to trial and the Court stated: "Where there has been a substantial lapse of time between the publicity and the trial, there is a far lesser likelihood the publicity will affect the jurors' deliberations." This same principle was recognized in *United States, ex. rel. Rosenberg v. Mancusi,* 445 F.2d 613 (2 Cir. 1971), *cert. denied* 405 U.S. 956 (1972) (eight months between crime and trial); and in *United States v. Bowe,* 360 F.2d 1 (2 Cir. 1966), *cert. denied,* 385 U.S. 961 (adverse publicity appeared "several months" prior to trial); and *Beck v. Washington,* 369 U.S. 541 (1962) (nine and one-half months sufficient time for impact of prejudicial publicity to subside).

This finding of the decline in community feeling above referred to is not an inference made by the Court, but is supported by the evidence presented. For example, although mob or community violence was stated to be anticipated by certain members of the law enforcement community immediately after the crimes occurred and certain portions of the publicity which the Court now has before it indicate a high level of emotion in members of the community, no actual threats or violence ever materialized in Seminole County against Petitioners or any of their coindictees and, in fact, some of the newspaper articles and other forms of publicity urged community restraint and aided the subsidization of community emotion.

By way of example, the Court notes the editorial column entitled "Out on a Limb" by Bo McLeod in the

Donalsonville News, published Thursday, May 24, 1973. This article contained the following language and is considered by the Court as indicative of community sentiment in Seminole County during the relevant time period:

> Yes, the four men suspected and accused of the murder of the six Aldays can get a fair trial in Seminole County. . . . The people of this community are capable of cooperating with and respecting the various steps toward their trial. They are very angry about what happened. . . . There is a wide difference in the question of whether the people here could give the suspects a fair trial, and in our wanting to see guilty ones punished and removed from being able to commit the same outrages again, a few years from now, on other innocent people.
>
> But our people want to be sure that the suspects now being held in jail are the ones who committed the crimes. We don't want to see four innocent men punished. . . . We're innocent of bias and prejudice, until you prove us guilty. . . . Few screwballs among us who get a thrill out of talking dumb and sounding off about what all they'd like to do to the four men, . . . but they're in the extreme minority, and they are pretty well known for their lack of sense.
>
> Bud Alday spoke the sentiments of his family when he said they didn't want to see anybody else get hurt in this terrible tragedy that came our way, "enough people have been hurt already," he said. . . . The only thing that any kind of mob action, or inciting troublesome thoughts can bring is more sorrow. . . . The law must be obeyed.

The Court considers this statement on the editorial page of the local newspaper to be indicative of the sentiments of the community, i.e., that the citizens of the community certainly wanted to see the persons responsible

for the crimes punished, not that they wanted to see Isaacs and Dungee or their coindictees punished if they were not responsible.

Based on the foregoing Findings of Fact the Court concludes that the volume of publicity in and of itself has not established the requisite prejudice, as will be discussed more fully in the Conclusions of Law to be made at the end of this order. The Court will now state its Findings of Fact relative to the nature of the publicity given to the crimes.

In *Patton v. Yount, supra,* the Court noted that during the voir dire proceedings the newspaper published articles on almost a daily basis, but that the articles were "purely factual articles". Similarly, in reviewing the nature of the publicity disseminated about the crimes in this case this Court finds that most of the articles and reports were straightforward factual reports about the crucial events in the proceedings then taking place, whether that was the discovery of the five bodies, the search for the body of Mary Alday, the funeral of the victims, the identification and capture of the suspects, the return of the suspects to Georgia, the suspects' arraignment, the indictment by the grand jury, the appointment of counsel, the filing of pretrial motions, hearings on the pretrial motions, or the anticipation of the beginning of trial and the selection of potential jurors.

This Court finds as did the Court in *Patton v. Yount, supra,* that many of the newspaper accounts in the *Donalsonville News,* the *Albany Herald,* the *Bainbridge Post-Searchlight* and the *Dothan Eagle,* as well as the transcript of the broadcasts of the Georgia Network News

were announcements of trial dates and scheduling which is common in rural newspapers as to criminal matters.

None of the publicity reviewed by the Court reveals a situation such as that presented in *Rideau v. Louisiana*, 373 U.S. 723 (1963), in which the defendant confessed to several crimes committed in a parish in Louisiana, which confession was videotaped and broadcast on three occasions by a local television station. with the broadcast being seen by 24,000, 52,000 and 29,000 people within the community. *See* 373 U.S. at 724. *(See also* Remand Order of the Court of Appeals for the Eleventh Circuit, footnote 8). No statements of Isaacs or Dungee or any of their coindictees were made public by means of newspaper accounts or electronic means. Additionally, there were very few statements made by the prosecution team trying the case, except the statement that there were perhaps 50 potential witnesses to be called at the trial of the defendants, with approximately only 20 persons who would actually be called to testify, and the statement that Billy Isaacs was expected to testify for the prosecution against his coindictees. There were statements made by Petitioners' lawyers and other defense attorneys, but even these statements were brief and generally did not comment on any of the evidence which might be brought out at trial. There were very few editorials concerning the crime and most persons quoted in the newspaper did not make public comments about what punishment they believed that the persons responsible for the murders deserved.

It seems clear that the nature of the publicity provided Seminole County citizens and citizens of the southwest Georgia area with a great deal of information con-

cerning the crimes and the suspects and that this publicity, as well as word-of-mouth communication, aroused citizens' interest in the crimes, but this Court can in no way characterize the majority of the publicity, either in newspaper form or as contained in electronic media broadcasts, as having been of that brand of publicity referred to as "yellow journalism". The Court can find no "barrage of inflammatory publicity" in the record before this Court such as discussed in *Murphy v. Florida*, 421 U.S. 794, 798 (1975), as cited in *Patton v. Yount, supra.*

In *Mayola v. Alabama*, 623 F.2d 992 (5 Cir. 1980), Michael Mayola, who was convicted of the first degree murder of an eleven year old boy, contended intensive pretrial publicity and community prejudice had prevailed in Oneonta, Alabama and the surrounding county. The United States Court of Appeals for the Fifth Circuit found that the publicity in that case was "highly prejudicial" because it contained references to erroneous reports showing that the victim had been sexually assaulted and mutiliated and made recurring references to Mayola's prior convictions. The Court also found that there were "exploitative illusions to alleged sexual perversion". *Id.* at 998. A perusal of the record before this Court reveals no such misstatement of the facts surrounding the commission of the crimes or the evidence ultimately admitted in the trial of Petitioners or their coindictees. Although arguably two detective magazines found in the Donalsonville, Georgia area contained rather explicit descriptions of the crimes and the suspects, these magazines were introduced at the original hearing on the motions for change of venue and it was revealed that one of the magazines was removed from a local newsstand because the owner of the news-

stand felt the article written concerning the murders in Seminole County was "misleading". (Motion for change of venue hearing transcript, p. 7.) It has never been established that persons who may have bought this magazine were citizens of Seminole County and therefore prospective jury members.

Headlines from the *Donalsonville News* illustrate the straightforward type of news reporting generally found in the pretrial publicity submitted for examination: Thursday, May 24, 1973, "Four Are Accused of Alday Murders"; Thursday, May 31, 1973, "No Date Set for Committal Hearings for Four Accused in Alday Murders"; June 14, 1973, "New Lawyers Are Named to Four Charged with Murder"; Thursday, July 19, 1973, "Committal Hearing Time Set For Accused in Alday Case"; Thursday, September 6, 1973, "Grand Jury Returns total of 19 charges in Alday Cases"; Thursday, October 11, 1973, "Judge Geer Sets December Date for Alday Murder Trial".

Similarly, excerpts from the Georgia Network News tapes reveal the following types of information being communicated by radio or television: 8:30 a.m., Tuesday, May 15, 1973, ". . . authorities in Donalsonville, Georgia say they have found the bodies of five persons, all said to be members of one family, shot dead in a house trailer. Details of the incident are sketchy. . . .;" 3:30 p.m., Tuesday, May 15, 1973, "We have new developments at this hour in the mass murder of six members of the Alday family of Donalsonville in Southwest Georgia. Police are now looking for prison escapees from up north"; 9:30 a.m., Friday, May 18, 1973, "Police in West Virginia using dogs captured the remaining three of four suspects in connection of

the six Alday murders. . . ."; 12:30 p.m., Friday, May 18, 1973, "A sigh of relief, and then more tragedy in Donalsonville, Georgia today. The sigh comes from the ultimate capture this morning of the remaining three fugitives at large in the six Alday murders from Tuesday morning . . . the tragedy comes with the word that the mother of Mary Alday, who police say was raped, then murdered near Donalsonville, died of a heart attack earlier today . . . Sheriff White said he's had no specific threats of a lynching . . ."; 7:30 a.m., Monday, May 21, 1973, "Averett Alday found the bodies of five of the six victims last Thursday. Now he's asking Seminole Countians to keep their heads during these emotionally charged days. He says enough folks have been hurt already"; 8:30 a.m., Monday, May 21, 1973, "within the hour, the four suspects in the killings of six members of the Alday family of Seminole County take off from Atlanta for a flight to Donalsonville and a pretrial hearing in the charges they murdered the six Aldays a week ago tonight. Their bodies were discovered by another Alday, Bud, last Tuesday. And Bud Alday is now urging his neighbors in the town of twenty-five hundred to keep calm while the four suspects go through the criminal justice system. . . ."; 12:30 p.m., Monday, May 21, 1973, ". . . here are the latest developments in the Donalsonville murders . . . the four arrived and were turned over to Seminole County Sheriff Dan White and escorted into the courthouse. There was a crowd of about one hundred inside, about the same number outside. According to State Division of Investigation Director Bill Beardsley, the crowd has been quiet. [Recording] "Well, they just appear interested. They certainly are taking everything in and just paying attention to what's going on"; 2:30 p.m., Monday, May 21, 1973, "Those Four suspects in the Alday

murders in southwest Georgia have been taken before a preliminary hearing in Donalsonville. One of the four asked for a mental examination. As for the citizens of Donalsonville, apparently they're keeping their cool, in spite of the intense emotion which followed the mass murders last week. Division of Investigation Chief Bill Beardsley told us he doesn't expect any problem: [Recording] "Oh, no, no, uh-uh. These are very sophisticated people down here. We didn't anticipate anything, and I'm just sure there won't be anything"; 4:30 p.m., Wednesday, August 8, 1973, "Committal hearings were scheduled today in Donalsonville, Georgia for three of the four defendants in the Alday murder case. The three are charged with the murders of six members of a south Georgia farm family earlier this year. Today's hearings were behind closed doors and under tight security."

By selecting the above quoted excerpts from the *Donalsonville News* and from the Georgia Network News tapes, the Court does not intend to place undue emphasis on either of the two sources or to imply that only the selected references were reviewed by the Court, but the selection does indicate types of materials that were contained in those two sources, as well as in some of the previously mentioned sources.

In short, this Court finds as fact that a majority of the news reports with reference to these crimes were straightforward, factual and non-inflammatory, and that a great deal of the publicity revealed that community tension which was initially high, subsided and, as will be discussed, culminated in the trials of the three persons ultimately tried for murder in a "controlled" courtroom atmosphere.

While Isaacs and Dungee have not specifically alleged that there was a "carnival atmosphere" in the courtroom as found to exist in such cases as *Estes v. Texas,* 381 U.S. 532 (1965), and *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the Court deems the atmosphere in the courtroom during the trials to be important in determining the impact of any publicity on the community so as to determine if Petitioners were denied their right to a fundamentally fair trial. All of the evidence shows that citizens of Seminole County who were prospective jurors were barred from the court proceedings and that tape recorders, cameras and other electronic equipment was banned from the courtroom. Additionally, presiding Judge Geer limited the press to a specific area of the courtroom and allowed limited ingress and egress. Judge Geer was not required to quell any emotional outbursts from the Alday family members or spectators in the courtroom during the trials. By way of example, Reporter William Montgomery of the *Atlanta Journal* testified that there was no "weeping or wailing" in the courtroom, that there were no shouts of grief from the audience and that generally the courtroom atmosphere was such that it was not necessary for the judge to demand order in the courtroom. Similar testimony was given by Mr. Bill Cotterill of the United Press International, as well as other persons testifying who were present in the courtroom during the trial.

There are many other observations which this Court could make about the amount of publicity and its nature, but to comment specifically on all evidence before the Court is unnecessary and would serve little purpose at this juncture. The Court simply repeats that it does not find that the pretrial publicity given to the trials of those charged with the Alday murders was sufficiently "preju-

dicial", "inflammatory", or "impassioned" as to amount to a denial of fundamental fairness or that the setting of the trial was inherently prejudicial as a matter of fact so as to render the trials fundamentally unfair.

Having made these Findings of Fact, and having previously noted the law to be applied in this case, the Court reiterates that the principle of "presumptive prejudice", as the United States Court of Appeals for the Fifth Circuit noted, is only "rarely applicable". *Mayola v. State of Alabama, supra,* at 997, *quoting Nebraska Press Association v. Stuart,* 427 U.S. 539, 544 (1976). Further, the Court in *Mayola* stated that a petitioner must demonstrate an extreme situation of inflammatory pretrial publicity that saturates the community in which the trial is conducted and declined to apply the presumptive prejudice standard of *Rideau v. Louisiana, supra.*

Having reviewed the landmark cases in the area of alleged prejudicial pretrial publicity, in light of the recent decision of the United States Supreme Court in *Patton v. Yount, supra,* this Court simply finds that Petitioners have failed to carry their burden of establishing "essential unfairness", as the result of alleged prejudicial pretrial publicity. Petitioners have established neither actual nor presumptive prejudice due to the volume or nature of the pretrial publicity, considered in the context of the nature of the community, the nature of the victims, the nature of the defendants and all other relevant factors.

Succinctly stated, this Court concludes that Isaacs and Dungee were not convicted because of pretrial publicity. They were convicted and received the sentences imposed because of the overwhelming uncontradicted evidence of their wilful participation in what is generally regarded as

the most heinous criminal orgy in the history of the state. Therefore, the Court denies Petitioners federal habeas corpus relief based on their allegation of prejudicial pretrial publicity.

CONCLUSION

WHEREFORE, in accordance with the remand Order of the United States Court of Appeals for the Eleventh Circuit as supplemented by later orders, this Court now certifies these Findings of Fact and Conclusions of Law to the Court of Appeals for its consideration and the disposition of Petitioners' appeal.

This 18th day of March, 1985.

/s/ J. Robert Elliott
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8017

CARL J. ISAACS and GEORGE ELDER DUNGEE,

Petitioners-Apellants,

v.

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellee.

No. 85-8202

GEORGE ELDER DUNGEE,

Petitioner-Appellant,

v.

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellee.

No. 85-8277

CARL J. ISAACS,

Petitioner-Appellant,

v.

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

(December 9, 1985)

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge.

ANDERSON, Circuit Judge:

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* Hon. Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

Petitioners Carl J. Isaacs and George Elder Dungee appeal from the federal district court's denial of their habeas corpus petitions.[1] On May 14, 1973, five members of the Alday family were shot to death in their mobile home in Donalsonville, Georgia. A sixth person, Mary Alday, was taken from the mobile home, raped, and then shot to death.[2] On September 4, 1973, Seminole County's grand jury indicted Carl Isaacs, Dungee, Billy Isaacs, and Wayne Carl Coleman on six counts of murder. Some three months later, Billy Isaacs, Carl's sixteen-year old brother, pleaded guilty to armed robbery and burglary. He was sentenced to a forty-year prison term. Shortly thereafter, the three remaining defendants were tried separately, convicted, and sentenced to death by electrocution. Several post-conviction proceedings followed.[3] Petitioners have exhausted their state remedies.

In this habeas proceeding, petitioners raise five issues: (1) whether pretrial publicity and the community's atmosphere were so prejudicial and inflammatory that the trial court's refusal to grant appellants' motion for a change of venue deprived them of their Fourteenth Amendment due process rights; (2) whether, under the Fourteenth Amendment's due process clause, appellants received sufficient notice specifying the aggravating circumstances which the prosecutor would rely on in the sentencing phase of the bifurcated trial; (3) whether the trial court's jury instruction on intent impermissibly shifted the burden of proof from the state to the petitioners in violation of the Fourteenth Amendment's due process clause; (4) whether Georgia's death penalty is applied in a discriminatory manner, thus violating the dictates of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); and (5)

whether the district court erred in refusing to allow appellants leave to amend their petition to add claims which are, in large part, already before the court in a related case.[4] We have carefully reviewed the entire record available for our consideration, and we conclude that the district court's order denying habeas relief should be reversed on the basis of the first issue raised by the petitioners.[5]

This court has considered the presumed prejudice issue at length in the companion case of *Coleman v. Zant*, No. 82-8310, published simultaneously with this opinion. In *Coleman*, we concluded that highly prejudicial publicity had saturated and inflamed the community to the extent there was overwhelming prejudice in Seminole County both as to petitioner Coleman's guilt and the sentence he should receive. Accordingly, we presumed prejudice under *Rideau v. Louisiana*, 373 U.S. 723 (1963). While the legal standards and relevant facts are basically the same, there are some differences between Coleman's case and the cases of Isaacs and Dungee.

We must determine whether differences between the cases of Isaacs and Dungee, on the one hand, and Coleman's case on the other hand, suggest that prejudice should be presumed for Coleman, but not for Isaacs and Dungee. Upon review, we conclude that while there are differences between the cases, these differences are not of sufficient significance to warrant a different result in Isaacs' and Dungee's cases.

The primary difference between Coleman's case and that of petitioner Isaacs is that the verdict and sentence in the previous cases as well as the explicit details of Billy Isaacs' testimony were not published prior to Carl Isaacs'